THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
D. Garrsion Hill, Circuit Court Judge

Case No.: 2013-GS-23-003231; 003232; 003233; 003234; 003235; 003236
Appellate Case No.: 2015-000312

The State, ... Respondent,

vs.

Jerald Denton Gaskins, Jr., ... Appellant.

INITIAL BRIEF OF APPELLANT

J. Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile
jfalknerwilkes@gmail.com

COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE

Appellant was indicted by the grand jury in Greenville County for three counts of criminal sexual conduct with a minor second degree, and three counts of lewd act upon a minor. A jury trial was held on February 4th and 5th, 2015, the Honorable D. Garrison Hill presiding. Kristie B. Hodge, Assistant Solicitor, represented the State at trial. Randall L. Chambers, of Greenville, represented the Appellant at trial. The Appellant was found guilty on all counts and sentenced to four 20 year sentences, one 15 year sentence, all of which were concurrent, and to one 5 year sentence which was consecutive, with the provision that the 5 year sentence was to be served first. Timely notice of appeal was served. J. Falkner Wilkes represents the Appellant on the appeal of this case.

STATEMENT OF THE FACTS

The defendant was accused of having a sexual relationship over the course of a year and a half with the prosecutrix (N.M.) while she was 13 to 14 years of age. 192-197. The defendant denied the allegations. 421, l. 24-422, l. 1. At the beginning of the trial, outside the presence of the jury, the state declared an intent to offer the testimony of H.B. as evidence of other bad acts under Rule 404(B). 240-242. The state argued admissibility under the common plan or scheme exception: "We're saying that he operates in the same manner. Good, bad, or indifferent, we're not saying. But we're saying that he operates consistently the same way, targeting young girls, schmoozing, talking big, talking good, talking them into having sex with them." T. p. 263, l. 9-15. The defendant denied the allegations involving the state's 404(B) witness. 421, l. 19-23.

The state claimed that the events involving the 404(B) witness were factually similar to those involving the prosecutrix: "They were 13, eighth grade, met at horseshoes, had sex at the Defendant's residence, went to the abandoned house and had sex. And the Defendant used a condom. It was vaginal-penile penetration." 242, l. 21-25. The state argued that the 404(B) evidence established a *modus operandi*. 261-262. The defense argued that the similarities were merely generic and that the two were distinctly dissimilar. 242-258. Contrary to the

state's argument, the facts fail to show that the 404(B) evidence established a *modus operandi* or otherwise sufficiently similar to allow its admission.

The 404(b) Evidence:

H.B. testified that she met the defendant in the spring of 2011 at the prosecutrix's house. 247. That the first time she met the defendant they went outside to the defendant's car and started talking. 248. While sitting in the car talking they exchanged phone numbers. 248. She said that their first conversation in the car "immediately" became flirtatious. 248. About a month later during a cookout at the defendant's house she and the defendant went into a back room and immediately started kissing for twenty or thirty minutes. 249-250; 312. She characterized a relationship of *mutual interest*, stating that the next time they were together "*we* just started flirting again." 250, l. 24-25. She testified that one thing led to another and they had sex again. 250-251. H.B. testified that she was a "*very*" willing participant, and that she put forth her efforts into making it happen. 252, l. 14-16; 315. She claimed to have had sex with the defendant three times. 254.

The essence of the state's case as to the indicted offenses was that the defendant established a sexual relationship with the prosecutrix through the manipulation of her and her family over an extended period of time. The

evidence showed that the defendant and his family were close friends with the prosecutrix and her family. 64. The defendant's family would often go to the prosecutrix's house. 136. They had contact for over a year and half. 137. They were together as families at times on a daily basis. 83. The mother of the prosecutrix testified that the defendant was generous and gave them money to help out with their bills. 71. The prosecutrix claimed that the defendant helped her parents with their bills, including their car insurance, "to blind them away from what was happening." 288, l. 8-10.

H.B. lived with her grandparents. 255. Unlike the long established relationship that existed between the prosecutrix's family and the defendant's family, there was no evidence that the grandparents even knew the defendant, much less were friends or ever had any contact with him. 255. Also unlike the claims of almost constant contact between the prosecutrix and defendant, the contact between the defendant and H.B. was limited to communicating "over Facebook occasionally." 250, l. 16. By her own testimony H.B. was a very willing participant and that she actually worked at making "it" happen. H.B.'s testimony is distinctly different than the testimony of the prosecutrix and the state's theory that the defendant heavily manipulated the prosecutrix and her family to establish a sexual relationship.

While H.B. had little contact with the defendant's family, the prosecutrix essentially lived at the defendant's for an extended period of time. The prosecutrix would come over to the defendant's house two or more times a week while the defendant's wife was there. 139. She spent nights at the defendant's house. 138. She was at the defendant's house close to every weekend. 203. This continued into 2011 when the defendant moved to Magnolia Trailer Park where she was given a bedroom. 140. During that time the defendant's wife helped the prosecutrix with her homework and she helped the wife with the defendant's daughter, Skyland. 140. The prosecutrix also went places with the defendant's family such as bowling and to the movies. 141. She continued to come to the defendant's house even when the defendant and his family moved to Central, and later to Traveler's Rest in 2012. 145; 150-151. There is no evidence that the defendant and the 404(B) witness had similar contact with the defendant and his family.

The alleged sexual contact also differed greatly between H.B. and the prosecutrix. The defendant's wife testified that one night she found the defendant and the prosecutrix on the couch together. 148. The prosecutrix testified that the defendant had sex with her at his house while his wife was in the shower, and then went back to playing games and watching TV like nothing

had happened and ended up spending the night. 192-196. She also testified that while in Central she had sex with the defendant at his house while his wife was at the hospital. 205. They had sex, including oral sex, again at the house while the wife was asleep. 207. The prosecutrix claimed that she and the defendant had sex at different locations in different rooms. 199-200. She also testified that sometimes it was "full" sex and sometimes oral sex. 200. She testified that they had sex, including oral sex, in the defendant's car. 202. The prosecutrix testified that they continued to have sex everyplace the defendant moved. 198. These events are significantly dissimilar to those alleged by the 404(B) witness.

The prosecutrix also testified that she continued to have sex with the defendant because he had a short temper and in the back of her mind she didn't want to get yelled at. 213. These facts are also dissimilar to the 404(B) testimony.

The nature of the defendant's normal daily contact between the prosecutrix and the 404(B) witness is also hugely dissimilar. The prosecutrix testified that the defendant went to her school events, like volleyball tournaments or practices. 138. According to the defendant's wife the defendant had constant contact with the prosecutrix through text messages or calls to the prosecutrix. 137. When the prosecutrix had her phone cut off for going over her minutes on her parent's data plan, the defendant bought her a cell phone on his plan. 73. When that cell phone

was taken away due to poor grades, she testified that the defendant secretly provided another cell phone. 74. In contrast to the constant contact alleged by the prosecutrix, the 404(B) witness testified that she only had occasional contact with the defendant through Facebook. The dissimilarities clearly far outnumber any generic similarities between the testimony of the prosecutrix and the 404(B) witness.

In addition to the stated 404(B) evidence the solicitor repeatedly raised other evidence of bad acts or bad character throughout the trial. The solicitor asked the defendant on cross-examination about Jennifer Anglin's daughter T. W. 444. Despite not being the subject of direct examination the solicitor went into a line of questioning involving T. W. The solicitor's questions clearly implied that the Defendant was making some improper contact with T. W. using an assumed name. 445. The solicitor offered no proof to substantiate the allegations that were the subject of her questions. 446.[1] The solicitor then went on to question the defendant about the existence of a no contact bond with his fiancé Angelina Campbell. 446. The solicitor asked if the no contact provision was a condition of his bond. 446. The solicitor made a point to inform the jury, under the guise of

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[1]The solicitor discussed T. W. and the defendant's cousin (H.G.) at sentencing claiming "that law enforcement has received a complaint on that he was doing the same type of things, attempting to engage this child." 514, l. 5-11.

asking the defendant a question, that the defendant had an active charge against him:

Q: All right. So are you, currently, engaged right now?

A. Yes, I am.

Q: To whom?

A: Angelina Campbell.

Q: Is she in court today.

A: Yes, she is.

Q: Isn't there a no-contact order between you and Angelina?

A. There was.

Q: No. There is, isn't there?

A: I'm not sure. It's - -

Q: As a condition of your bond, you're not supposed to have contact with her; isn't that correct?

A: No, it's not correct. It was supposed to have been dissolved.

Q: Sir, you have an active charge with her; correct?

A: Ma'am, once again, it was supposed to be dissolved.

Q: Sir, you have an active charge with her, do you not?

A: I don't know if I do or not, ma'am. But, once again, it was supposed to

have been dissolved.

Q: Am I your prosecutor on that case?

A: I don't know if you are or not - -

Q: Have you not called me numerous times asking me - -

A: No, ma'am, I have not. No. There was a letter sent to you, an affidavit filled out for you.

Q: And have you been instructed by our office that that case is not dropped and you are not to have contact with her?

A: Ma'am, I was once told it was dismissed. So I don't know what's going on with it - -

Q: Who were you told that by?

A: I guess your office.

Q: No, sir. No one from my office - -

445, l. 22-447, l. 4.

The solicitor went on to make the point again:

Q: But do you have an active charge with her? 447, l. 12.

There was never any evidence offered as to the alleged charge or no contact order to make it admissible or the proper subject of questioning before the jury.

The solicitor again attempted to bring up other bad acts evidence on cross of the defendant asking him about an *incident* with his cousin H.G. 456. The state never offered any evidence to establish the admissibility of the any "incident" involving the defendant's cousin under Lyle and Rule 404(B).

The state elicited testimony from the investigating officer that he left his card for the defendant so the defendant could tell him his side of the story but that "He never contacted me." 354, l. 4-5. The solicitor went on to follow up that giving the defendant an opportunity to talk with the officer was something he normally did. 354, l. 10-11.

The solicitor asked the defendant on cross if he was supplementing his disability income by selling pot or pills. 442. There was no attempt by the state to establish any basis for the question under 404(B) or other any rule. 442.

In closing the state characterized the defendant as a pack of lions preying on a baby. 487-488. The state then repeatedly made personal representations to the jury in closing argument: I think the defendant has personal self-worth issues. 488. Vouching for the 404(B) witness H.B: "I think she was very, very humble when she took the stand." 488, l. Vouching for the prosecutrix: "I think she really like[d] him. And I think that is what's embarrassing right now, too, is that she, actually, fell for that." 490. I think she liked being around him." 491. "Because I

think what he told her and what she thought was that one day, they were going to run off together." 491. "So, yeah, maybe her testimony wasn't exactly as we would have like it to be, quite as humble, and as open, and honest as [H.B.'s], but it wasn't a lie." 490, l. 8-10.

ARGUMENT

Standard of Review

In criminal cases, the appellate court sits to review errors of law only. State v. Baccus, 367 S.C. 41, 48, 625 S.E.2d 216, 220 (2006). Thus, an appellate court is bound by the trial court's factual findings unless they are clearly erroneous. *Id.*

I. THE COURT ERRED IN ALLOWING EVIDENCE OF PRIOR BAD ACTS UNDER STATE V. LYLE, 125 S.C. 406, 118 S.E. 803 (1923), AND RULE 404(B), SCRE.

In this case the Appellant is charged with multiple counts of criminal sexual conduct and lewd act involving a single individual N.M., the prosecutrix in this case. Over the defense's objection the state introduced evidence of other bad acts with a second individual, H.B., who was about the same age as the prosecutrix. Over the defense objection, the testimony of H.B. was allowed as other bad act evidence under the common plan or scheme exception to Lyle and Rule 404. This was error.

Generally, "evidence of other distinct crimes committed by the accused may not be adduced merely to raise an inference or to corroborate the prosecution's theory of the defendant's guilt of the particular crime charged." Lyle, 125 S.C. at 415, 118 S.E. at 807. However, there are certain well-established exceptions to this general rule:

[E]vidence of other crimes is competent to prove the specific crime charged when it tends to establish, (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; (5) the identity of the person charged with the commission of the crime on trial. Lyle, 125 S.C. at 415, 118 S.E. at 807; Rule 404(b), SCRE ("Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."). State v. Fonseca, 681 S.E.2d 1, 383 S.C. 640 (S.C. App., 2009).

Motive was not made a material issue at trial and the occurrence of physical contact was denied by the defendant. The introduction of the prior bad act is therefore unsupported under the motive and intent exceptions provided in Lyle and Rule 404. State v. Fonseca, 681 S.E.2d 1, 383 S.C. 640 (S.C. App., 2009). Likewise, neither mistake, accident nor identity were at issue in the trial. The introduction of the prior bad act evidence is therefore equally unsupported by related exceptions under Lyle or Rule 404. Common plan or scheme was the only exception argued by the state as its basis for the admission of the Rule 404

evidence.

Common Plan or Scheme

[E]vidence of other crimes is competent to prove the specific crime charged when it tends to establish a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others. Lyle; Rule 404(B). "When determining whether evidence is admissible as [a] common scheme or plan [under Rule 404(b)], the [circuit] court must analyze the similarities and dissimilarities between the crime charged and the bad act evidence to determine whether there is a close degree of similarity." Wallace, 384 S.C. at 433, 683 S.E.2d at 277-78. "A close degree of similarity exists when the similarities outweigh the dissimilarities.'" State v. Scott, 405 S.C. 489, 500, 748 S.E.2d 236, 242 (Ct. App. 2013) (*quoting* Wallace, 384 S.C. at 433, 683 S.E.2d at 278).

"The common scheme or plan exception 'is generally applied in cases involving sexual crimes, where evidence of acts prior and subsequent to the act charged ... is held admissible as tending to show continued illicit intercourse between the same parties.'" Kirton, 381 S.C. at 10, 671 S.E.2d at 117 *citing* State v. Whitener, 228 S.C. 244, 265, 89 S.E.2d 701, 711 (1955). Here the other bad act evidence is not between the same parties, instead it involves a third party, H.B.,

and is alleged to have occurred prior to the offenses charged. Other than the occurrence of sex, the alleged offenses and the other bad act evidence bear little material resemblance.

Due to the lack of substantial similarities in this case between the testimony of the prosecutrix and the 404(B) witness, the probative value of the other bad act evidence is slight. *See* State v. Kirton, 381 S.C. 7, 9, 671 S.E.2d 107, 117 (Ct.App.2008) (holding a common scheme or plan requires similarity between the prior act and the charged act that increases the probative value of the evidence); State v. Aiken, 322 S.C. 177, 180, 470 S.E.2d 404, 406 (Ct.App.1996) (noting the more similar the prior act is to the charged act, the more likely the evidence will be admissible); State v. McClellan, 283 S.C. 389, 392, 323 S.E.2d 772, 774 (1984) (finding prior bad acts are admissible when close similarity between the acts enhances the probative value of the evidence so as to outweigh the prejudice).

In this case there are no more than generic similarities between the offenses for which the defendant was charged and those alleged by the 404(B) witness. The connection between the prior bad act and the crime must be more than just a general similarity. State v. Timmons, 327 S.C. 48, 488 S.E.2d 323 (1997); State v. Mathis, 359 S.C. 450, 597 S.E.2d 872 (Ct.App.2004); State v. Stokes, 279 S.C. 191,

193, 304 S.E.2d 814, 815 (1983). Generic similarities fail to meet the standard necessary for admissibility. A *close degree of similarity* or connection between the prior bad act and the crime for which the defendant is on trial is required to support admissibility under the common scheme or plan exception. State v. Cheeseboro, 346 S.C. 526, 546, 552 S.E.2d 300, 311 (2001); State v. Ford, 334 S.C. 444, 513 S.E.2d 385 (Ct.App.1999) *emphasis added.*

The prior bad acts alleged through the testimony of H.B. fail to establish any common scheme or plan, much less raise to the level of *modus operandi* as argued by the state. "Clear and convincing evidence of prior crimes or bad acts that is logically relevant is ... admissible to prove ... a common scheme or plan that embraces several previous crimes so closely related to each other that proof of one tends to establish the other." State v. Moultrie, 316 S.C. 547, 554, 451 S.E.2d 34, 39 (Ct.App.1994). Here, the prior bad acts fail to do more than establish evidence of propensity and bad character, which is clearly impermissible: "It is well established that evidence of other crimes or prior bad acts is inadmissible to show criminal propensity or to demonstrate the accused is a bad individual." State v. Johnson, 293 S.C. 321, 360 S.E.2d 317 (1987); *see also* State v. Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (finding that evidence of prior crimes or bad acts is inadmissible to prove bad character of defendant or that he acted in conformity

therewith).

In Fonseca the court rejected the State's argument that two incidents that occurred in Fonseca's marital home while his wife was in the other room, demonstrated that the Fonseca had a common scheme or plan to attack the victim while his wife was not present or was in the other room. Fonseca, which was adopted by the supreme court as well reasoned[2], appeared to be the first sign of a slowing of the Wallace juggernaut. Despite the court's ruling in Fonseca, the rule of Lyle and 404 against the use of propensity evidence has continued to be eroded, virtually to the point of non-existence in criminal sexual abuse cases, especially those involving minors. As pointed out by the dissent in Wallace:

> [O]ur cases holding that evidence of other acts of sexual misconduct is admissible in a trial for criminal sexual conduct with a minor as a "common scheme or plan" under Rule 404(b), SCRE, have, in effect, created an exception to the rule's exclusion of propensity evidence. *Compare, e.g.*, Vogel v. State, 315 Md. 458, 554 A.2d 1231 (Ct.App.1989). We have repeatedly held in non-sexual offense cases that, "the mere presence of similarity only serves to enhance the potential for prejudice," State v. Tuffour, 364 S.C. 497, 613 S.E.2d 814 (Ct.App.2005) vacated on other grounds 371 S.C. 511, 641 S.E.2d 24 (2007) internal citations omitted, yet under the majority's view, similarity is the touchstone of admissibility in child sexual offense cases. In my view, if we are to permit the admission of propensity evidence in these types of cases, then we should propose a new rule of evidence, and encourage public comment. *See e.g.* Rules 413 and 414, Fed.R.Evid.; Rule 404(c), Az. R. Evid. In light of the controversy engendered by these rules in other jurisdictions,[7] I believe that thorough scrutiny is warranted.

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[2]State v. Fonseca, 393 S.C. 229, 711 S.E.2d 906 (S.C. 2011).

State v. Wallace, 384 S.C. 428, 683 S.E.2d 275 (2009) *Justice Pleconies, dissenting.*

In this case, the state has offered nothing more than propensity evidence. Any similarities are merely generic and far outweighed by dissimilarities between the facts surrounding the prosecutrix and the 404(B) witness. While the state argued that the 404(B) evidence was offered to show that the defendant had sex with the prosecutrix through a pattern or scheme of manipulation, it failed to show that H.B or her family were similarly manipulated. What it did show was that the defendant had sex with a young girl before, therefore allowing the jury to infer that the defendant had the propensity to commit the offenses charged. In any other type of case, evidence of this nature would have immediately been judged too dissimilar under Lyle and Rule 404.

Even if the other bad act evidence were admissible under Rule 404(b), the testimony of H. B. should have nevertheless been excluded, as its probative value was substantially outweighed by the danger of unfair prejudice to the defendant. State v. Braxton, 343 S.C. 629, 541 S.E.2d 833 (2001); Beck, 342 S.C. at 135-36, 536 S.E.2d at 683; *see also* Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence."). Unfair prejudice means an undue tendency to suggest a decision on an improper basis, commonly, though not necessarily, an emotional one. State v. Sweat, 362 S.C. 117, 606 S.E.2d 508 (Ct.App.). State v. Fletcher, 363 S.C. 221, 609 S.E.2d 572 (S.C. App., 2005) The testimony of H.B. was unnecessary to any element in the state's case and overly prejudicial. As a result, the 404(B) evidence in this case should have been excluded under both Rules 404 and 403. Its admission was therefore error.

Harmless Error Analysis

To deem an error harmless, this court must determine "beyond a reasonable doubt the error complained of did not contribute to the verdict obtained." Taylor v. State, 312 S.C. 179, 181, 439 S.E.2d 820, 821 (1993) (*citing* Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)) (*internal quotations omitted*). Due to the prejudicial tendency of admitting prior bad act testimony it cannot be said that beyond a reasonable doubt the verdict was not affected by the evidence. *See* Fosneca, *supra*. Therefore, the erroneous admission of evidence under 404(B) in the defendant's case constitutes reversible error.

II. THE COURT ERRED IN ALLOWING QUESTIONS CONCERNING INFLAMMATORY TEXT MESSAGES WITHOUT A PROPER FOUNDATION.

On cross-examination the solicitor questioned the defendant about text

messages allegedly sent to the prosecutrix's father some time after the defendant had been arrested on the present charges. 424. The solicitor asked the defendant if 561-7021 was his phone number. 424. The defendant testified that it was not. 424. He testified that he was not texting from that number. 425. The solicitor asked the defendant to read the content of the text messages aloud for the jury. 425. The defense objected to the solicitor asking the defendant to read aloud the contents of the messages. 426. The defense argued that there had been no foundation laid to allow the messages to be read aloud for the jury. 426. The court sustained the objection. 426, l. 9. Then, despite the objection having been sustained, the solicitor continued by reading the content of the text messages aloud to jury herself in the form of a question:

Q: Did you text - - well, here's how I'll do it. Did you text Walt on June 22nd of 2013, and state to him, Will you drop charges, or are we going to court? Either way, I'm still going to hang out with you. Just be honest with me?

A: No, I did not.

426, l. 11-16. Despite the continued denial of having sent any text messages during that time frame or from that phone the Solicitor continued:

Q: Did you text him, my life is - - excuse me - - fucked up - -

Again defense counsel objected. 426, l. 17-19. The objection was sustained and

the jury excused. 426.

After the jury was excused there were arguments as to the propriety of having the contents of the text messages read aloud to the jury before they had been authenticated and offered into evidence. 427. The solicitor maintained that she should be allowed to read the text messages *verbatim* and force the defendant to answer whether he made each statement. The solicitor admitted that she could not introduce the statements through the defendant, but stated that she had a rebuttal witness that she would put on the stand to lay a foundation for the admission of the text messages. 426. In the discussions the court noted that what was "troublesome" was that solicitor was essentially publishing something not yet in evidence. 429. The court overruled the defense objection and allowed the solicitor to continue reading the texts aloud in the form of a question. 430. The court's ruling, however, appears to have been based on the solicitor's representation that the state would call a rebuttal witness to lay a proper foundation and have the text messages entered as evidence. 430.

The solicitor then continuing reading the content of the inflammatory text messages aloud before for the jury in the form of questions to the defendant:

Q: All right. Mr. Gaskins, did you text Walt Mucienko on June 21st of 2013, and ask him to drop the charges so y'all could bounce and go hang out

with Ian, your higher power God?

A: No, I did not.

Despite denying having sent the message the solicitor continued questioning the defendant about the message:

Q: Who is Ian?

A: I have no idea.

Q: What is the higher power God?

A: I have no idea either.

The solicitor continued:

Q: Did you text him again on June 22nd of 2013, and ask him again, about dropping the charges, saying, If not, that's cool, but don't want to hassle with going to court?

A: No I did not.

431, l. 17- 432, l. 4.

Despite the defendant's consistent and repeated denials of sending the text messages the solicitor continued reading the inflammatory contents of the alleged text messages in front of the jury in the form of questions:

Q: Okay. So you didn't text him about going to Oklahoma to make some money - -

A: No, ma'am. I did not.

Q: Okay. And you didn't text him then about, Why have you not dropped this shit on me? And why are you letting Sandy drag it --

A: Once again, I never texted him from 2013 forwards at all.

Q: Okay. And so then you didn't text him to say, Sandy must be threatening you, daddy?

A: No, ma'am. I did not.

432, l. 22-433, l. 9.

Despite having indicated that the state would call a witness to lay a foundation and authenticate all of the text messages that were read aloud to the jury, when asked if the state intended to bring any reply the solicitor responded: "I don't think I need to." 463, l. 9.

In this case the jury should not have heard the substance of the texts messages without the state first laying a proper foundation and authenticating the content of messages through a witness with personal knowledge of origin of the messages. "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Rule 602, SCRE. Here, the defendant denied any knowledge of the messages and the solicitor failed to call a witness as promised

that could lay a proper foundation for the messages. Absent a proper foundation the state failed to establish the relevance of the evidence. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Rule 401, SCRE.

Despite the defendant's denial of any knowledge of the text messages the prejudicial impact of solicitor's lengthy questioning is apparent. They were not only inculpatory, but also cast the defendant as a liar, pitting him against witnesses that were never called. The defense could not cross-examine or challenge the authenticity of the text messages. This left the jury to infer authenticity from the solicitor's insistent use of the them. As the court had earlier indicated, the solicitor was using them as they though they were evidence in the case. The potential for the jury to consider the text messages is obvious. The solicitor's intent that the jury the jury consider the text messages as evidence is clear as she later argued them to the jury in closing argument, claiming that the defendant's denial of the text messages was not believable. 494. This of course constituted arguing facts outside of the record. "Solicitors must confine their closing arguments to evidence in the record, tailoring comments to the evidence presented and its reasonable inferences. State v. Woomer, 277 S.C. 170, 284

S.E.2d 357 (1981); State v. Linder, 276 S.C. 304, 278 S.E.2d 335 (1981)." State v. Primus, 341 S.C. 592, 535 S.E.2d 152 (S.C. App., 2000).

Based on the solicitor's failure to properly lay a foundation and authenticate the inflammatory text messages, the exact problem arose that the court had earlier predicted. The solicitor's reading of numerous text messages before the jury under the guise of questioning could only be perceived as evidence by the jury. Absent a foundation the state failed to establish the relevance of the evidence. Absent any relevance, the evidence fails to withstand a probative value versus prejudice analysis under Rule 403, SCRE. It was therefore error for the circuit court to allow the questioning without having the solicitor first lay a proper foundation.

In light of the inculpatory and inflammatory nature of the text messages, the prejudice resulting from the solicitor's improper questions undermines a finding of harmless error. *See* State v. Padgett, 2010 MO 17 (S.C., 2010).

III. THIS COURT SHOULD CONSIDER THE OVERALL PREJUDICE IN ANY HARMLESS ERROR ANALYSIS ON ALL ISSUES.

The cumulative prejudicial effect of evidence, questioning, and improper argument throughout the case should be considered in evaluating the prejudice effect of the appealable issues raised herein. The determination of whether an

error is harmless depends on the circumstances of the particular case. State v. Reeves, 301 S.C. 191, 391 S.E.2d 241 (1990). No definite rule of law governs this finding. *Id.* Rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. State v. Mitchell, 286 S.C. 572, 336 S.E.2d 150 (1985). "An error is harmless where it could not reasonably have affected the result of the trial. *Id.* In the present case, unappealable due to the lack of an objection or the failure to request curative instructions, the record is replete with instances causing undue prejudice.

Without any foundation to establish admissibility under Rule 404, the solicitor asked the defendant on cross-examination about numerous other bad acts. The solicitor made absolutely no attempt at laying a foundation for questions implying bad acts involving Jennifer Anglin's daughter T.W. 444. The solicitor's questions clearly implied that the Defendant was making improper contact with T.W. under an assumed name. 445. The brought up other bad acts on cross of the defendant alleging an *incident* with the defendant's cousin H.G. 456. The solicitor offered no proof whatsoever to substantiate the questions, or otherwise establish a valid basis under Rule 404 and *Lyle* for the admissibility of any evidence relating to H.G. or T.W. 444; 446.

The solicitor then went on to question the defendant about the existence of

a no contact order involving his fiancé Angelina Campbell. 446. The solicitor asked if the no contact provision was a condition of a bond, presumably a criminal bond. 446. The solicitor made a point to inform the jury, again under the guise of asking the defendant a question, that the defendant had an unrelated active criminal charge against him. 446. No foundation was laid for this line of questioning. 446. Although most of the inflammatory questioning went without an objection, and are therefore unappealable, the prejudice remains apparent and appropriate for this Court to consider in any harmless error analysis.

The state further caused undue prejudice by eliciting testimony from the investigating officer that he left his card for the defendant so the defendant could tell him his side of the story but the defendant never contacted him. The solicitor went on to follow up that giving the defendant an opportunity to talk with the officer was something he normally did. Although this also went without objection it clearly added to the overall prejudice in the case.

The solicitor went on to further prejudice the defendant in the jury's eyes by asking the defendant on cross if he was supplementing his disability income by selling pot or pills. 442. There was no apparent basis for asking this question, nor any attempt by the solicitor to establish the admissibility of such evidence. It was asked simply to show the jury the defendant's bad character. See State v.

Beck, 342 S.C. 129, 536 S.E.2d 679 (2000) (finding that evidence of prior crimes or bad acts is inadmissible to prove bad character of defendant or that he acted in conformity therewith). This went without an objection from defense counsel, but again it clearly added to the overall prejudice in the defendant's case. 442.

The solicitor also pitted the defendant against the state's witnesses: "So you're telling us the state did not present any true evidence. Is that what you said?" 456, l. 15-16. When the solicitor asks an argumentative question requiring the defendant to explain the truthfulness or testimony of an adverse witness, the question is improper. "No matter how a question is worded, anytime a solicitor asks a defendant to comment on the truthfulness or explain the testimony of an adverse witness, the defendant is in effect being pitted against the adverse witness. This kind of argumentative questioning is improper." Burgess v. State, 329 S.C. 88, 91, 495 S.E.2d 445, 447 (1998). Particularly when credibility is the crucial issue in a case, improper pitting of witnesses is prejudicial and cannot be deemed harmless. Sapps, 295 S.C. at 486, 369 S.E.2d at 146; Brown, 297 S.C. at 29, 374 S.E.2d at 670.

In closing the state characterized the defendant as a pack of lions preying on a baby argument that went without objection. 487-488. The solicitor then went on to make numerous personal representations in closing argument: "I think Mr.

Gaskins has some personal issues, some personal self-worth issues." 488, l. 4-5. The solicitor vouched for the 404(B) witness (H.B.) stating: "I think she was very, very humble when she took the stand." 488, l. 22-23. The solicitor then vouched for the prosecutrix, "I think she really like[d] him. And I think that is what's embarrassing right now, too, is that she, actually, fell for that." 490, l. 5-7. I think she liked being around him." 491, l. 10-11. "Because I think what he told her and what she thought was that one day, they were going to run off together." 491. "So, yeah, maybe her testimony wasn't exactly as we would have like it to be, quite as humble, and as open, and honest as [H.B.'s], but it wasn't a lie." 490, l. 8-10.

Despite the lack of objection by the defense, it is clear that the state repeatedly placed before the jury improper questions that prejudiced the defendant, offered improper and inflammatory evidence, and made improper argument to the jury. "Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts." State v. Black, 400 S.C. 10, 732 S.E.2d 880 (S.C., 2012). In the defendant's case the record is rank with prejudice that, although unappealable, should nevertheless be considered as part of the record as a whole in any harmless error analysis.

CONCLUSION

Based on the foregoing the conviction and sentence of the defendant should be reversed.

Respectfully submitted,

J. Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864)282-1292

Counsel for Appellant

January 4, 2016.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of General Sessions
D. Garrsion Hill, Circuit Court Judge

Case No.: 2013-GS-23-003231; 003232; 003233; 003234; 003235; 003236
Appellate Case No.: 2015-000312

The State, ... Respondent,

vs.

Jerald Denton Gaskins, Jr., ... Appellant.

CERTIFICATE OF SERVICE

I certify that on the 4th day of January, 2016, I served the Appellant' Initial Brief on the Respondent by placing a copy of same in the U.S. Post, first class postage prepaid, addressed to counsel of record as indicated below:

J. Benjamin Aplin, Assist. Dep. Atty. General
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211

Respectfully submitted,

J. Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
(864) 271-6035 facsimile
jfalknerwilkes@gmail.com

January 4, 2016.

J. FALKNER WILKES

Attorney at Law

114 Whitsett Street
Greenville, South Carolina 29601

Telephone: (864) 282-1292
Facsimile: (864) 271-6035

January 4, 2016

Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: State v. Jerald Denton Gaskins, Jr., 2013-GS-23-03231

Dear Ms. Kitchings,

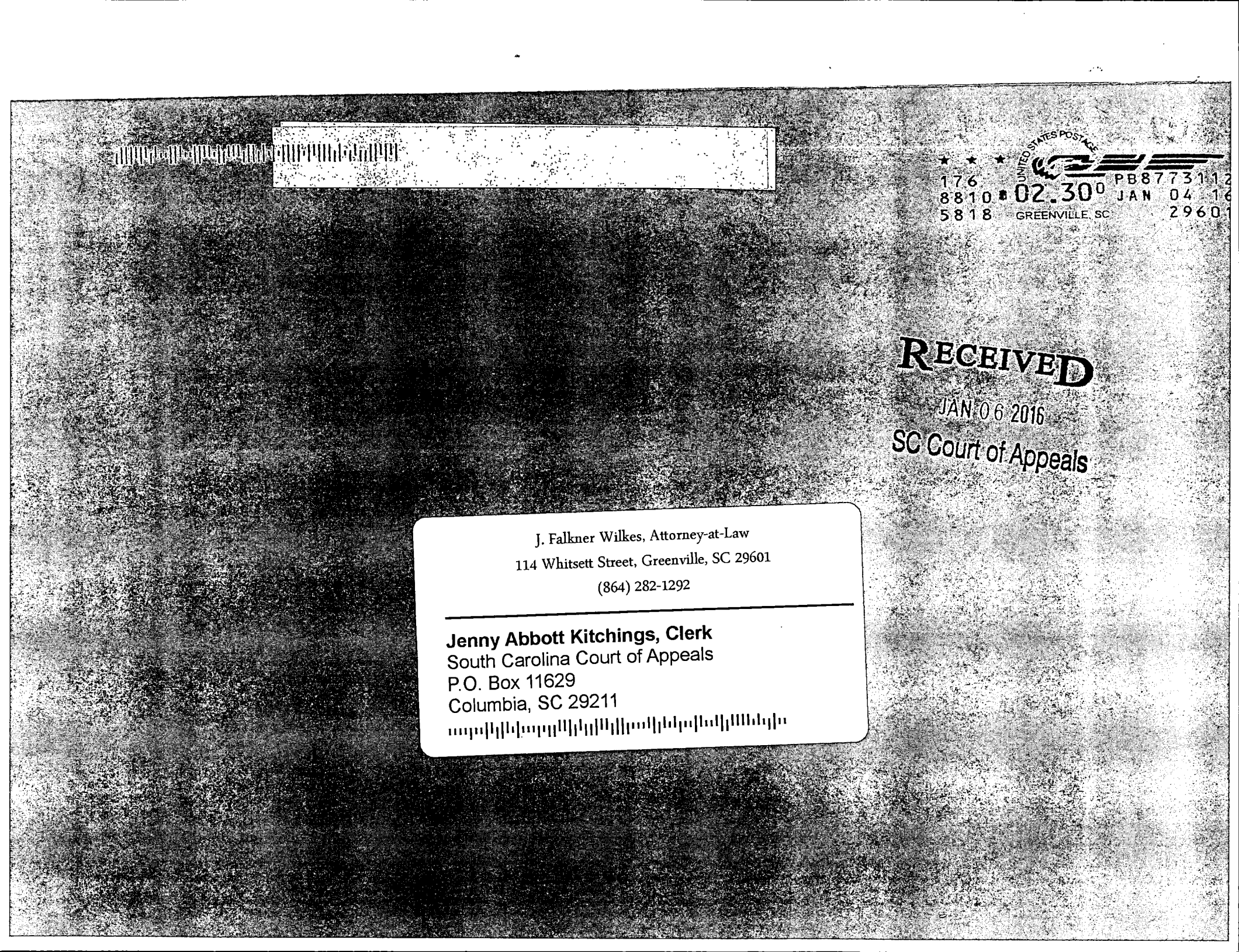
Enclosed please find the Initial Brief of Appellant, Designation of Matter and Certificate of Service.

Sincerely,

J. Falkner Wilkes

c.
J. Benjamin Aplin, Assist. Dep. Atty. General
P.O. Box 11549
Columbia, SC 29211

Jerald Denton Gaskins, 00362923
Perry Correctional Institution
430 Oaklawn Road
Pelzer, SC 29669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SC Court of Appeals
J. Falkner Wilkes, Attorney-at-Law
114 Whitsett Street, Greenville, SC 29601
(864) 282-1292
Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211